



# Generally Speaking

## COMINGS and GOINGS

### *Welcome to:*

**Laura Martinez, LOA I**, Anchorage Human Services Section; **Samantha Christenson, LOA I**, Anchorage Regulatory Affairs and Public Advocacy and Commercial and Fair Business Sections; and **Sheila Bugbee, Administrative Officer II**, Juneau Administrative Services Section. Sheila previously worked in the section from 2004-2006.

The Juneau Labor and State Affairs Section welcomed **LOA I Joleen Langel**; she comes to the department from the Department of Health and Social Services. The section is sad to note **LOA I Janet Mehl's** transfer to the Child Protection Section, but delighted to congratulate **Angie Hobbs**, on her promotion to **LOA II**.

The Fairbanks DAO welcomed **ADA Andrew "Andy" Baldock**, previously with the Illinois State Attorney's office in East St. Louis.

## CIVIL DIVISION

### Child Protection

**New CINA cases** based upon allegations in OCS petitions:

OCS took emergency custody of seven children when one of the older children reported sexual abuse in the home. The children also reported domestic violence and substance abuse. All seven children were placed in emergency foster homes.

A hospital made a report of harm when an infant presented with brain hemorrhages consistent with having been shaken. The child also had scars that resembled cigarette burns and was very underweight. OCS assumed emergency custody.

After working with a family for the last seven years to stabilize the home and get necessary treatment for the parents, OCS removed the children from the home when their efforts were unsuccessful. The father, who is also the primary care giver for the children, had recently started drinking again and was allowing a violent person to reside in the home with his children. The mothers of the children either couldn't be located or have substance abuse problems of their own.

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OCS assumed emergency custody of a teenage boy when his parents refused to allow him to come home. The parents claim the boy is aggressive and mentally ill. OCS placed him in a shelter.

OCS' efforts to reunify a child with his family were unsuccessful because the mother refused to follow up on the necessary medical services for the child. The child remains in care. Recently, OCS was made aware that a sister in the home was experiencing similar issues. The mother had instructed the child to not be honest with OCS. Due to the mother's history of allowing her children to decompensate after treatment and refusing to get them appropriate medical treatment, OCS sought a court order for custody of the children.

OCS responded to a report of physical abuse in the home. Upon investigation, the home was found to be filthy and smelled of urine. The children had visible marks on them and the oldest children reported they are left to care for the younger children quite often. All children reported being hungry as there was very little food in the home. It is believed the mother may be mentally ill. OCS assumed emergency custody of all four children.

OCS responded to a report of physical abuse of a child. The child had marks on her face and the parents admitted that the child was injured as a result of a domestic violence episode between the parents. The parents also admitted to drug use. A family friend took the children for a couple of days until she was no longer able to care for them and OCS had to assume emergency custody.

OCS assumed emergency custody of a newborn baby due to the risk of harm presented by the mother. The mother, who has severe substance abuse, has one other child currently in state's custody. She has not participated in any services that would allow her to be reunified with her children and a petition to terminate her parental rights is pending.

OCS responded to a report that a father had been shot in the home, leaving no one to care for a toddler who also lived there. Upon further investigation, the mother was located. She has a long history with OCS that includes substance abuse and domestic violence. OCS assumed emergency custody and placed the child in foster care.

Numerous children across the state were taken into custody as a result of serious risk of harm as a result of their parents' substance abuse and domestic violence.

### Collections and Support

AAG Karen Ince received a favorable result in her Alaska Supreme Court case of *Fowler v. State of Alaska, Dep't of Revenue, CSSD*, -- P.3d -- (Alaska 2007). This case involved the appeal of the Alaska court's registration of an Idaho child support order for enforcement. Mr. Fowler, the parent ordered to pay support, objected to Alaska's registration of the Idaho child support order claiming the order was void because the Idaho court did not provide him with due process before it entered the order. Despite Mr. Fowler's objection, the Alaska trial court registered the Idaho order. The Alaska trial court found the Idaho court provided Mr. Fowler with notice of the proceedings including notice of a hearing. The Supreme Court affirmed the trial court's registration and adopted the trial court's order on reconsideration as its written opinion, deciding in favor of CSSD.

### **Fiscal Year 2007 Collections**

The Collections Unit collected over \$5.8 million in fiscal year 2007.

Cost of Appointed Counsel:	\$ 766,254.73
Cost of Incarceration:	\$ 906,679.55
Court Fines:	\$1,213,817.45
Traffic & Minor Offense Fines	
& Bonds:	\$ 482,142.96
Court & Collection Costs:	196,275.94
Criminal Restitution:	1,414,228.14

Juvenile Restitution: 836,979.50

TOTAL FY07: \$5,816,378.27

In October and November, the Collections Unit received 2007 PFD garnishments and assignments exceeding \$4.5 million.

## Commercial and Fair Business

### **Consumer Protection Unit Continues Outreach Efforts**

The Consumer Protection Unit continued its rural outreach efforts in November. AAG Cynthia Drinkwater conducted classes in Dillingham and Kodiak on Identity Theft and Fundamentals of Fraud as part of the consumer protection/financial education workshops sponsored by the AARP and the Division of Banking. The unit has also published a new brochure entitled "Consumer Protection in Alaska" which describes the Attorney General's role in consumer protection, provides information to consumers on pursuing claims on their own, and summarizes some Alaska consumer laws.

### **Alaska Supreme Court Affirms Division of Insurance Decision**

AAG Signe Andersen received a favorable decision from the Alaska Supreme Court in the matter of *Premera Blue Cross v. State of Alaska, Department of Commerce, Community & Economic Development, Division of Insurance*. The Court held that the division had acted reasonably in implementing a retaliatory tax statute, that the statute applied to Premera and that the statute did not violate Alaska's equal protection and substantive due process clauses. In reaching its decision, the Court gave deference to the division based on the agency's expertise and longstanding interpretation of the statute.

This case started in 1997 when Blue Cross requested a refund of \$1,183,450 in retaliatory

taxes it paid in 1995 and 1996 under the operation of AS 21.09.270. Under AS 21.09.270, the Alaska Division of Insurance will impose a retaliatory tax on an insurer doing business in this state, if the taxes, licenses, and fees, in the aggregate, that would be imposed by the insurer's home state on a similar Alaska insurer would exceed the taxes, licenses, and fees, in the aggregate, that are imposed on the insurer under the laws of this state. This statute, therefore, sets up a comparison between the aggregated taxes, licenses, and fees in the insurer's home state and in Alaska based on the same volume of business. If the aggregated taxes, licenses, and fees of the home state would exceed the same in Alaska, the difference between the two is imposed as a retaliatory tax on that home state's insurer doing business in Alaska.

According to Premera, it should not have paid retaliatory taxes in 1995 and 1996, because of assessments it paid, as required by state law, to Alaska's Comprehensive Health Insurance Association (ACHIA) and the Small Employer Health Reinsurance Association (SEHRA). Premera argued that these assessments should have been included in the retaliatory tax calculation, which would have resulted in no retaliation. The director for the division issued an order denying Premera's request for a refund. The director concluded that the ACHIA and SEHRA assessments are not taxes, licenses, and fees and, therefore, should not be included in the aggregate calculation of taxes. The director also concluded that an exception to retaliation for "special purpose obligations or assessments imposed by another state" did not operate to include Alaska's special purpose obligations or assessments, such as the ACHIA and SEHRA assessments, in the retaliatory tax calculation.

Premera appealed to the superior court. Premera also filed an action for declaratory judgment challenging the application of AS 21.09.270 to it going forward, alleging that the statutes governing Premera as a hospital medical service corporations precluded application of the

statute to Premera, that the division incorrectly interpreted and applied AS 21.09.270, and that AS 21.09.270 as applied to Premera was unconstitutional under the state equal protection and substantive due process clauses. The administrative appeal and declaratory judgment action were consolidated. The superior court (Judge Reese) affirmed the director's order and granted summary judgment to the division on the issues raised in the declaratory judgment action.

In its decision, the Alaska Supreme Court rejected each of Premera's arguments on the merits of its claims and affirmed the division's interpretation of AS 21.09.270 as well as the division's interpretation of statutes governing hospital medical service corporations in AS 21.87. Notably, the Court applied a deferential standard of review because the interpretation of AS 21.09.270 involved agency expertise and because the division's practice with respect to the application of AS 21.09.270 was longstanding and continuous. The Court held that the division's interpretation and application of AS 21.09.270 was reasonable and consistent with a reasonable interpretation of the terms of the statute. The Court also rejected Premera's constitutional challenges finding that AS 21.09.270 did not violate equal protection or substantive due process.

The Court, however, ruled against the division on the argument that Premera's failure to protest the taxes paid in 1995 and 1996 barred its refund claim. According to the Court, the division waived the right to argue this point, because at the administrative level, the division entered into a stipulation regarding the facts and agreed to hear Premera's refund request on the merits. As a result of this decision, Premera owes the state retaliatory fees in the principal amount of \$2,309,989 for the tax years 1998 through 2004 and an attorney's fee award of \$30,000 for a total judgment of \$2,769,045.36, which includes prejudgment interest. Post-judgment interest has been accruing at 5% per annum since December 10<sup>th</sup>, 2004.

## **The Alaska Supreme Court Upholds Constitutionality of Statute**

The Alaska Supreme Court on November 22 issued a decision in *Godfrey v. State* upholding AS 43.70.075, the tobacco endorsement statute, against a due process challenge.

AS 43.70.075 requires tobacco retailers to have tobacco endorsements on their business licenses. Subsection (d) of the statute provides for automatic penalties (civil penalties and suspensions of the endorsement) if the endorsement holders, or their employees, are convicted of violating AS 11.76.100 (negligently selling tobacco to minors). This case involved the two incidents of clerks selling cigarettes to minors at a Tesoro station owned by Richard Godfrey in Juneau. The Division of Corporations, Business, and Professional Licensing, pursuant to AS 43.70.075(d), gave notice to Godfrey that his endorsement to sell tobacco products would be suspended for a cumulative 65 days (20 days for the first sale, 45 days for the second), and would be assessed cumulative penalties of \$800 (\$300 for the first sale, and \$500 for the second).

Godfrey requested an administrative hearing for each sale. The issues at the hearing are statutorily limited by AS 43.70.075(m) to: a) whether the endorsement holder or the employee was convicted of violating AS 11.76.100, and b) whether the employee was acting within the scope of employment. Godfrey moved to dismiss the proceedings, arguing that the process is unconstitutional because it denies employers a full and fair hearing as required by due process.

After the hearing, the hearing officer found that the employees were acting within the scope of their employment when they sold tobacco to minors and that they had been convicted of violations under AS 11.76.100. The hearing officer recommended a cumulative suspension of 65 days and a civil fine totaling \$800, which was accepted by the Commissioner of Commerce

as the final decision in the matters. Godfrey appealed to the superior court. Superior Court Judge Patricia Collins affirmed the commissioner's decision finding that, under the facts, Godfrey's due process rights had not been violated and it was not necessary to reach whether the statute was unconstitutional. Godfrey appealed to the Alaska Supreme Court.

On appeal, Godfrey claimed that the statute violated his due process rights because, among other things, he was denied a valuable property right – suspension of his tobacco endorsement and imposition of civil fines – without the opportunity to dispute whether two of his employees, who had pleaded guilty or no contest to violating AS 11.76.100, had actually been negligent in selling tobacco. The Court found that an employee's conviction for negligently selling tobacco to a minor, whether by plea or judicial finding, provides a reliable basis for finding the license holder has given a minor unlawful access to tobacco and for imposing administrative sanctions on that ground. The Court noted that AS 43.70.075(d) strives to enforce the state's strong interest in preventing all underage sales by holding licensees liable for any such sale, whether negligent or not. The Court concluded, "when an industry engages in commercial activity that routinely exposes the public to significant harm, the legislature has a legitimate interest in holding the industry's licensed participants accountable for all conduct in exercising the license, not just for the licensee's personal negligence or fault." AAG Cynthia Drinkwater represented the Department of Commerce, Community and Economic Development in the appeal.

## Human Services

### **Litigation Update**

The majority of the section's time continues to be taken up with Certificate of Need issues: Two appeals were received from the two Certificate of Need matters that resolved administratively last month: *ITMO: Kobuk*

*Ventures, Fairbanks Memorial and Advance Medical* and *ITMO: South Anchorage Joint Venture*.

Section Chief Stacie Kraly filed a proposal for action in *ITMO: Imaging Associates of Providence* where the administrative law judge granted the cross motion for summary judgment. The matter is now before the commissioner for final decision.

Motion practice on cross-motions for summary judgment is complete in *Mat-Su Valley Hospital v. APC and Commissioner Jackson*.

Section Chief Kraly is also working on a Supreme Court brief in the *Alaska Open Imaging, LLC, and Dr. Bridges v. Commissioner Jackson and Fairbanks Memorial Hospital*. The brief is due December 10th.

AAGs Calik, Fowler, Bakalar, and Section Chief Kraly filed the motions to dismiss in the following Medicaid matters last month – *Radenbaugh, Smart, and Washington*.

### **Medicaid**

#### **Subrogation/Liens**

During the month of November, the subrogation/lien/estate recovery team collected a total of \$206,843.00. The active caseload of third-party liability subrogation matters remains at approximately 700. The section has started the estate recovery work, setting up a protocol parallel to our general lien and subrogation protocol for liens, notice, and collection. AAG Shortell recovered approximately \$190,000 from the sale of a house. As a subpart of the estate cases, the section is developing form correspondence upon notification of the existence of a special needs trust and the recipient is in long-term care.

AAG Tim Twomey presented at the Elder Law Section of the state bar on the topic of Medicaid estate recovery.

LOA Shelby King created a law office assistant training manual that outlines in written and visual form the procedures for Medicaid subrogation matters.

### **Medicaid Audits**

AAGs Polizzotto and Bakalar submitted briefs in Medicaid audit appeals in the following cases: *Hearing Outreach (David Calvert)* and *Wilma's Place*.

### **Administrative Matters**

AAG Calik won an administrative fair hearing regarding eligibility under the TEFRA program. She participated in two other hearings related to Intensive Active Treatment services.

### **Other**

### **Licensing**

AAG Polizzotto conducted a 3-day training seminar for all OCS licensing workers covering the following issues: licensing statute (AS 47.32); elements of due process, background check regulations; how to prepare/refer a case for an administrative hearing; and good report writing. She also represented the Division of Public Assistance, Child Care Licensing in a hearing regarding the denial of a childcare license in Fairbanks.

AAG Polizzotto is also working on procedures for the Department of Health and Social Services to implement in-house appeals procedures for licensing related enforcement actions (other than revocations, suspensions, denials) in order to assist in work load issues and better program management.

### **APS/API**

AAGs Russo, Fowler, and Bakalar continue to be extremely busy with adult guardianships and conservatorships statewide. The section has recently seen a steady increase in the number

of cases brought forward and anticipate the caseload will continue to grow.

### **Regulations**

The section continues to be busy with regulations, with a third emergency regulation packet being proposed this past month.

AAG Henriksen is on track to finish the coverage regulations by the end of the year.

## **Labor and State Affairs**

### **Elections**

### **Clean Water Initiative Litigation**

Two additional lawsuits were filed this month addressing whether two of the three so-called clean water initiatives should be certified. Certification must occur before an initiative petition can be circulated for voters' signatures, which is an important step toward placement of the measure on the ballot. The Lieutenant Governor denied certification of the first two initiatives after finding that the initiatives would effectively prohibit large-scale metallic mining and thereby violate the state Constitution's prohibition on the use of the initiative to make or repeal an appropriation. Finding that the third initiative proposal did not share this defect, the Lieutenant Governor certified the third initiative proposal.

In September the proponents of the initiatives filed *Holman v. Parnell*, and in October Judge Torrisi concluded that barring a use of a state asset was not equal to making an appropriation, and he ordered the Lieutenant Governor to certify the first initiative proposal. The state has appealed that order to the Alaska Supreme Court. Meanwhile, in November the opponents of the initiatives filed two lawsuits: the *Council of Alaska Producers* oppose certification of the first and third initiatives on a number of bases including an argument that the federal Clean Water Act preempts them; the *Association of*

*ANCSA Regional Corporation Presidents/CEOs* also opposes certification, making the same arguments as the Council of Alaska Producers. ANCSA seeks consolidation with the Council of Alaska Producers' action. AAG Mike Barnhill is handling these matters.

***Alaskans for a Common Language v. Kritz.*** On November 2, the Alaska Supreme Court issued its decision regarding a challenge to a ballot measure adopted in 1998 that made English the official language of government in Alaska. The case consolidated challenges against the initiative by a number of individuals interested in speaking officially, or listening to official speech, in non-English languages. In a decision authored by Justice Carpeneti, the Court found part of the measure unconstitutional, severed that portion, and found the remainder constitutional.

The part of the law violating the state Constitution was the statement, "The English language is the language to be used by all public agencies in all governmental functions." AS 44.12.320. The problem with the requirement was that it prohibited the use of non-English in oral communications between government employees and individuals even when an employee was willing and able to use another language to communicate effectively with a non-English speaker. Because the requirement prohibited the informal use of other languages, it burdened the right to speak freely under the state Constitution.

Although the Court found that the law furthered compelling interests, encouraging the acquisition of English and promoting communications and government efficiency, it concluded that the law did not do so in a sufficiently narrow manner or sufficiently effectively. Because less restrictive methods were available that would promote the state's interests, the Court held that the requirement was unconstitutional.

In contrast, the Court found that the second sentence of AS 44.12.320, which required that all official public documents and records be

prepared in English, when considered in isolation, did not prohibit informal communication in other languages. It allowed written documents in other languages so long as an English version was also available. The Court concluded that this requirement was sufficiently narrow to withstand review under the state Constitution. The Court applied the severability clause, severed the unconstitutional limit on oral speech, and allowed the requirement that English be used in the preparation of all official public documents and records to go into effect. Section Chief Jan DeYoung was counsel for the state.

## Employment

***Cashen v. Department of Administration.*** On November 15, after a three-day trial, Juneau Superior Court Judge Pallenberg ruled from the bench in dismissing as unproven Plaintiff Dan Cashen's Whistleblower Act and retaliation claims against the Department of Administration. AAG Mags Paton-Walsh handled the matter with assistance at trial from AAG Jessica Srader.

***Ward/Jones v. State.*** On November 8, the United States Court of Appeals for the Ninth Circuit issued its opinion in this case. Richard Postma (former AAG and currently Judge of the District Court for the State of Alaska) handled the case on behalf of the Office of the Governor. The Court held that 11th Amendment sovereign immunity bars claims by individuals brought against the state under the Government Employees Rights Act ("GERA"). This case involved two members of the personal staff of Governor Hickel—Margaret Ward and Lydia Jones. Both women filed charges under Title VII with the EEOC against the Office of the Governor in 1994, alleging discrimination, harassment, and retaliation. But because Title VII specifically exempts personal staff of elected state officials, the EEOC considered the claims under GERA—a statute enacted in 1991 to extend the protections of Title VII to elected officials' personal staff and advisors. The state's position was that, in enacting GERA, Congress had not validly abrogated sovereign immunity. The Court

agreed and remanded the case to the EEOC for dismissal.

The Court based its decision on the lack of any record of a pattern of intentional discrimination among governors' selected staff. Judge Noonan, an expert on sovereign immunity, authored the opinion. Judge Wallace concurred and Judge Paez wrote a long dissent, explaining that he would hold that GERA was an appropriate response to the evidence of employment discrimination in the states.

### **Energy Authority**

***Powercorp Alaska LLC v. Alaska Energy Authority.*** On November 16, the Alaska Supreme Court issued its decision concerning a potential bidder's protest of a 2004 invitation to bid (ITB) issued by the Alaska Energy Authority for switchgear systems to be installed in eight rural Alaska powerhouses. The ITB called for systems using a particular type of technology (programmable logic controllers) that AEA had used and found to be reliable, easily worked on, and readily available from several manufacturers. Appellant Powercorp Alaska LLC wanted to bid a system using a different type of technology (essentially a personal computer programmed with Powercorp's proprietary software). AEA had undertaken to test Powercorp's system in a separate project, but the test was not complete at the time this ITB was issued. Powercorp protested the ITB on several grounds, primarily asserting that AEA had directed the contract to a particular supplier. Hearing Officer Andy Hemenway issued a recommended decision denying the protest, which AEA adopted. The superior court affirmed, as did the Supreme Court, holding that AEA's decision to deny the protest had a reasonable basis in law and was supported by substantial evidence. The Supreme Court attached Hearing Officer Hemenway's decision as an appendix to its opinion. AAG Mike Mitchell handled the case with help on the brief from AAG Rachel Witty.

### **Local Boundary Commission**

#### ***Petitioners for the Dissolution of the City of Skagway v. Local Boundary***

***Commission.*** AAG Mike Mitchell argued this case before the Alaska Supreme Court on November 26. The issue is attorneys' fees. Petitioners prevailed in the superior court, obtaining a reversal of the Local Boundary Commission's decision denying an election concerning the formation of a borough, and were awarded Civil Rule 82 attorney's fees. Despite an economic motive for bringing the action and payment of the attorneys' fees by the City of Skagway, petitioners are arguing in this appeal for full attorneys' fees as public interest litigants.

### **Motor Vehicles**

***Huntley v. State.*** On November 5, AAG Krista Stearns filed a motion for summary judgment in this action by opponents of REAL ID, a federal law that sets a date in 2008 when federal agencies may no longer accept a state driver's license as proof of a person's identification *unless* the state's licensing procedures are certified by the United States Department of Homeland Security. Ms. Huntley claims that the department exceeded its statutory authority to regulate driver licensing when it adopted new identification verification standards for individuals applying for a driver's license. She contends that the identification verification standards are an attempt to comply with REAL ID and the department lacked legislative authority to comply with REAL ID. In addition, Ms. Huntley claims that 2 AAC 90.420 is invalid because the department's notice of the proposed regulation was insufficient and because the department did not disclose the true fiscal impacts of the regulation. Ms. Huntley has also filed a motion for summary judgment.



## Retirement and Benefits

The Office of Administrative Hearings issued a decision in another cashed-in leave appeal. The retiree had requested an adjustment to his pension benefits to include eight days of cashed-in leave per year allowable under his union agreement before the definition of "compensation" was amended in 1977 to provide that cashed-in leave was not compensation. Contrary to the administrator's position, the OAH held that the division had a practice of including "cash-in leave" as "compensation" before the amendment. However, it also held that a retiree may not "cherry pick" from different retirement systems: a retiree must accept one system and accept both the advantages and disadvantages of that system. Here, selecting the pre-1977 system (with the increase to "compensation" resulting from adding cashed-in leave) would mean the loss of other possibly more advantageous changes to the system that occurred after 1977. AAG Toby Steinberg handled the appeal for the administrator.

## Securities Litigation

The lawsuit on behalf of the Department of Revenue, the Permanent Fund Corporation, and the Alaska Retirement Management Board against Qwest Communications International over its allegedly fraudulent accounting practices has settled for \$19 million. The settlement amount is a significant increase over the amount offered to members of the class that declined to opt out. AAG Mike Barnhill assisted outside counsel Entwistle & Capucci.

**Special Thanks to** AAG Kathleen Strasbaugh for pitching in and taking on additional work this month when others needed her help, and AAGs Mags Paton-Walsh and Jessica Srader for their successful efforts taking the *Cashen* case to trial.

## Legislation and Regulations

During November 2007, the Legislation and Regulations Section spent a busy month preparing for and providing legal assistance to the second special session of the Alaska State Legislature. The second special session adjourned November 16, 2007. The section is coordinating the review for the legislation that passed. The section also edited and legally approved for filing the following regulations projects: 1. Board of Game (special provisions for drawing permits for Dall sheep and moose); 2. State Board of Education and Early Development (high school graduation qualifying examination remediation; teacher competency examinations); 3. Board of Public Accountancy (licenses; permits; examinations; and other items); 4. State Medical Board (licensure; code of ethics; and reinstatement); 5. Department of Revenue (permanent fund dividends); 6. Department of Natural Resources (Alaska Gasline Inducement Act qualified expenditures); 7. Alaska State Commission for Human Rights (investigations; conciliations; and hearings); 8. Department of Health and Social Services (personal care assistance under Medicaid); 9. Department of Environmental Conservation (air quality: regional haze and best available retrofit technology); and 10. Department of Commerce, Community, and Economic Development (occupational licensing fees; regional economic development grants).

## Natural Resources

### University Lands

Oral argument on cross-motions for summary judgment in the university lands litigation took place November 9 in Juneau Superior Court. Plaintiff environmental conservation groups have argued that legislation conveying approximately 260,000 acres of state land to the university endowment trust creates an unconstitutional dedicated fund. Defendants, the state and University of Alaska, have argued that the legislation disposes of a state asset (the land)

to a constitutionally chartered corporate entity with the constitutional authority to hold fee title to real property, and therefore does not appropriate future revenue that would otherwise be available to the legislature for appropriation. The section awaits Judge Pallenburg's ruling on the cross-motions for summary judgment. AAG Anne Nelson represents the state in this litigation.

### **Native Land into Trust**

The state filed a motion to intervene in *Akiachak et al. v. United States*, pending in Federal District Court for the District of Columbia. Plaintiff tribes and one individual challenge the regulatory bar prohibiting the Secretary of Interior from taking land into trust for the benefit of Native tribes and individuals in the State of Alaska. The regulatory challenge implicates state sovereignty issues as well as issues related to the scope and finality of the ANCSA land claims settlement. Natural Resources Section Chief Elizabeth Barry and AAG Anne Nelson represent the state, with support from AAG Paul Lyle.

### **Lower Cook Inlet Board of Fisheries Meeting Completed**

The Board of Fisheries conducted its first regulatory meeting of the 2007-2008 cycle from November 13 through 15 in Homer, where it considered Lower Cook Inlet finfish issues and a variety of supplemental issues. Notably the board liberalized some Lower Cook Inlet recreational salmon fisheries, expanded a subsistence shellfish fishery, rejected changes to the Aleutian Islands Pacific Cod fishery, and adopted a statewide proposal allowing vessel length limitations to be exceeded if due solely to the addition of a bulbous bow (which greatly improves fuel efficiency and may have safety benefits) in fisheries where the board has authority to regulate vessel length. AAG Steven Daugherty covered the meeting and will work with the Alaska Department of Fish & Game staff and the Legislation and Regulations Section on the regulations coming out of the meeting.

***Eastwood v. State, CFEC.*** The parties in this appeal stipulated that appellant James Eastwood would waive further appellate rights in this case and be bound by the superior court's decision of September 28, 2007 as a final adjudication of all claims raised in this appeal in consideration of the state's waiver of its claim for attorney's fees. AAG Vanessa Lamantia represents the state in this case.

***Estate of Peter Phillips, Jr. v. CFEC.*** The state filed its appellee's brief in this second superior court appeal involving the denial of a Chignik purse seine limited entry permit application. Phillips died in 1990, and his estate is pursuing the application. Phillips' estate claims that he was denied due process in the application process because he did not receive a timely hearing, although he did not specifically request a hearing until 1990. After his request for a hearing was denied by the CFEC, he appealed that denial to the superior court, which overturned the decision and ordered a hearing. The hearing was held over a period of two days in 1994.

Despite this, he continues to argue in this second appeal that he was denied due process because the hearing was untimely and evidence was lost. Phillips' estate never previously argued, either on the first appeal or during the hearing, that there was evidence that had been lost or that he could not present because of the passage of time, even though Phillips had passed away before the first appeal. Phillips' estate also argues that Phillips is entitled to additional participation points due to unavoidable circumstances.

Specifically, it claims that Phillips, a Native, was discriminated against by the canneries that leased vessels to gear license holders and, therefore, he should be entitled to gear license points even though he did not hold a gear license. Evidence to the contrary includes a heated exchange between Phillips and the cannery boss in charge of leasing vessels, and the fact that after the vessel was no longer leased to Phillips,

it was leased to another Native from the same village.

The CFEC decided that Phillips did not meet his burden of proving that he didn't operate as a gear license holder due to unavoidable circumstances and denied his application with only 14 of 20 points. Phillips' reply brief is due December 24.

## Oil, Gas, and Mining

### **Oil and Gas Property Tax Case**

In 1997, the Department of Revenue (DOR) changed its interpretation of what constituted taxable property under the oil and gas property tax statute. The new interpretation broadened the definition of taxable property. A municipality filed an administrative appeal to compel the DOR to apply its new interpretation retroactively. The Department of Law filed a motion for summary adjudication arguing that the applicable statute of limitation bars the municipality's appeal and that the municipality could not compel the DOR to retroactively apply its new interpretative policy of what constitutes taxable property. The Office of Administrative Hearings granted the motion. AAG Jonathan Katchen is the attorney on the case.

### **Royalty Settlement**

AAG Richard Todd successfully negotiated a modification to the formula in the ConocoPhillips royalty settlement agreement regarding marine operating costs. The modifications brought allowed deductions more in line with actual costs, and avoided arbitration proceedings.

### **Tax Settlement**

AAG Ken Diemer assisted the Department of Revenue in obtaining a settlement of \$1,000,000, plus interest on that amount, as full payment of corporate income taxes owed for tax years 2000-2002 by a taxpayer under the Alaska Oil and Gas Corporation Net Income Tax.

The taxpayer paid additional taxes and interest owed on October 31, 2007.

## Opinions, Appeals and Ethics

### **Ethics**

AAG Judy Bockmon opened one more new investigation file and the section has six complaints and investigations open. She is working on draft decisions on two of the matters as well as investigating other open matters, and has addressed five conflict waiver requests this month.

AAG Bockmon also presented two sessions of ethics training this month. She continues to work on the manual for ethics supervisors.

### **Appeals/Litigation**

***Varilek v. McRoberts.*** AAG Megan Webb filed an appellate brief in *Varilek v. McRoberts*, on behalf of a former Department of Health & Social Services employee, John Burke, who was sued in a wrongful death action. The appellant argued that social worker Burke negligently granted and then failed to revoke an assisted living center license for the facility at which Martha Dunnagan was residing at the time of her death. The trial court dismissed this claim on a motion for summary judgment because, as a social worker with adult protective service (rather than licensing), Burke did not have a duty to license, inspect, or monitor assisted living centers. The appellant argued that final judgment should have been entered in his behalf and that he should have been awarded attorney's fees. AAG Dale House was the trial attorney.

***Hymes v. DeRamus.*** AAG Megan Webb also filed an appellate brief in *Hymes v. DeRamus*, on behalf of appellees. In this case, Donald and Rita Hymes sued under a number of legal theories for alleged harm related to medical treatment Mr. Hymes received while incarcerated. After the trial court entered summary judgment in

favor of the defendants, the Alaska Supreme Court reversed and remanded, instructing the trial court to permit the Hymes additional time to obtain an expert affidavit supporting their medical malpractice claims. Although the trial court provided the Hymes with the necessary time to obtain such evidence, it ultimately did not rule on the motion for summary judgment regarding medical malpractice.

While that summary judgment motion was pending, the defendants filed two more motions for summary judgment. In one motion, they asserted that the Hymes' claims were barred by the doctrine of failure to exhaust administrative remedies; in the other, they asserted that Rita Hymes' negligent infliction of emotional distress claim failed as a matter of law. The trial court granted both motions and entered final judgment in favor of the defendants.

The Hymes asserted on appeal that the trial court erred in granting summary judgment on the medical malpractice and loss of consortium claims based on the doctrine of failure to exhaust administrative remedies, that the trial court erred in declining to consider two expert affidavits (which were submitted in support of a motion for summary judgment upon which the trial court did not rule), that the trial court erred in granting summary judgment on the NIED claims, and that the judge should have recused himself. AAG Gail Voigtlander was the trial attorney.

***Alaska Trademark Shellfish, LLC v. State of Alaska, Department of Fish and Game.*** The Alaska Supreme Court issued a decision in favor of the Alaska Department of Fish and Game (ADF&G) in this case. Alaska Trademark Shellfish (ATS) applied for state permits in 1999 to allow it to engage in geoduck farming. ATS believed that the permits would allow it to harvest wild geoducks located on its farm sites. When ADF&G had not acted on the applications by February, 2000, ATS sued the state. ADF&G thereafter denied the applications because ATS refused to agree not to harvest

wild geoducks. ATS appealed, and the Alaska Supreme Court held that ADF&G lacked the statutory authority to grant aquatic farmers the exclusive right to harvest wild stocks.

ATS then returned to the superior court and argued that it had a viable claim to recover the money it spent in reliance on ADF&G's alleged promises that ATS could harvest wild geoducks. The superior court ruled that ADF&G and its officials were immune from suit under statute and under the doctrine of official immunity. ATS appealed again.

The Alaska Supreme Court held in its second decision in the case that in order to recover damages, ATS would have to rely on a promissory estoppel theory. Promissory estoppel would require that ADF&G had made an actual promise that induced ATS to rely on it and to substantially change its position. The court examined the actions of ADF&G in relation to the ATS permits, and found that ADF&G had never promised ATS that it would be able to harvest the wild geoducks on the farm sites. The appeal was handled by AAG Joanne Grace.

***State v. Jeffery.*** The Supreme Court issued a decision in *State v. Jeffery*. It held that Barrow Superior Court Judge Michael Jeffery and Anchorage District Court Judge Nancy Nolan should not have appeared on the 2004 ballot for retention.

The two judges filed suit after the Division of Elections refused to include their names on the ballot to be considered for retention in the 2004 general election. The judges had filed their declarations of candidacy 15 and 18 days after the statutory deadline of August 1. The Division of Elections did not accept the late-filed declaration because the Supreme Court had earlier held, in the context of legislative candidates, that the statutory deadline required strict compliance and that the Division of Elections has no discretion to waive it. Superior Court Judge William Morse ordered the division to put the names on the ballot, and

both were retained in the election. Several months later, Judge Morse issued a decision holding that the judges' submission of retention information to the Alaska Judicial Council was a sufficient declaration of candidacy to meet the statutory requirements. The Division of Elections appealed the decision to the Alaska Supreme Court, and that court reversed the lower court.

The Supreme Court held that the statute governing declarations of candidacy is unambiguous: "Each judge seeking retention in office shall file with the director a declaration of candidacy for retention no later than August 1 before the general election at which approval or rejection is requisite." The Court also noted that both the Judicial Council and the Division of Elections had reminded the judges to file the declarations by August 1, and that the judges had acknowledged in the letters accompanying their late-filed declarations that they had overlooked the deadline. The court determined that the determination of the Division of Elections that the judges had failed to comply with the deadline was supported by the facts and had a reasonable basis in law. AAG Joanne Grace handled the appeal.

***Baker v. State.*** AAG Joanne Grace had oral argument before the Alaska Supreme Court in this case. The issue presented is whether the state complied with due process in the notices it sent to recipients of Personal Care Assistant benefits to notify them of the results of a reassessment of their needs for the services. The Personal Care Assistant program provides in-home assistance with activities of daily living such as dressing, eating, and showering, and is intended to enable individuals who otherwise would have to stay in a hospital or nursing facility to stay at home, and to prevent job loss for those who otherwise would lose their employment. Recipients who received notice that their benefits had been reduced filed suit against the state, claiming that the notices did not meet the constitutional requirements of due process.

## Regulatory Affairs and Public Advocacy (RAPA)

### **Stipulated Settlements**

**U-07-26/U-07-38, CVTC rate modification.** In compliance with prior RCA order, Copper Valley Telephone Cooperative (CVTC) filed a depreciation study in February 2007 based upon a 2005 test year in docket U-07-26. In March 2007, CVTC filed a revenue requirement study with supporting testimony in docket U-07-38 for the stated purpose of using it in support of a related rate modification request in docket U-07-116. CVTA anticipates local exchange competition from GCI within its service area (which includes the communities of Chitina, Glennallen, McCarthy, Mentasta, Tatitlik, and Valdez).

The Attorney General/RAPA elected to participate in the related dockets primarily because they involve matters of first impression regarding implementation of new Commission regulations designed to allow an historical monopoly telephone provider to selectively adjust cost-based/regulated rates to meet competitive entry into some parts of its service area. (3AAC 53.245, Competitive Entry Rate Modification.)

RAPA review confirmed that, after minor adjustments, the utility's proposed depreciation study was consistent with RCA-adopted FCC depreciation ranges. A Stipulation to that effect was filed with the RCA in U-07-26 on November 9, 2007. Simultaneously, RAPA and CVTC agreed to numerous downward adjustments to the filed revenue requirement resulting in a revenue requirement *reduction* such that no overall rate increase should be implemented at this time. Therefore, a stipulated settlement of U-07-38 was also filed with the RCA on November 9, 2007.

CVTC's competitive entry rate cases remain pending (U-07-116/U-07-161). Subject to commission approval of the subject stipulations, the stage is now set for further proceedings to

examine proposed adjustments to rates in competitive and noncompetitive areas of the utility's service area, respectively, under the new regulations.

#### **New Case**

**U-07-141, Beluga Pipeline transportation rate case.** Beluga Pipeline Company (BPL) filed a tariff revision, TA21-448, on September 4, 2007 proposing to increase its currently interim/refundable rate for natural gas transportation service in the Cook Inlet. By approved stipulation in a prior case, U-04-81(16), BPL was required to file revenue requirement and cost of service studies, respectively, based upon a 2006 test year. BPL motioned for waiver of the latter study. BPL is owned by Marathon Oil Co (MOC).

Responsive to RCA invitation, the Attorney General/RAPA elected to participate in subject docket, just as it did in the previous docket related to BPL's transportation rate. The adjudicated rate will ultimately impact ratepayers of Enstar and Chugach Electric Association who are supplied with natural gas by shippers on the BPL pipeline. The State of Alaska petitioned to intervene because of the impact of the tariff rates upon the state's royalty and production tax receipts. MOC, Aurora Gas, UNOCAL, ConocoPhillips also petitioned to intervene in the proceeding.

The commission has yet to rule on outstanding motions. A procedural schedule has not been set.

#### **Pre-filed testimony**

**U-07-76/77, GHU/CUC (Fairbanks Sewer and Water).** Golden Heart Utilities (GHU) and College Utilities Corp. (CUC) are investor-owned utilities that provide water and wastewater service in the greater Fairbanks service area under a holding company, Fairbanks Sewer and Water (FSW). The utilities seek scheduled step increases of 5% per year for three years.

This is the third consecutive rate (increase) case filed in as many years by FSU.

The Attorney General/RAPA pre-filed the direct testimony of its witnesses on November 23. RAPA contract consultant, Dr. J. Randall Woolridge, offered testimony regarding the appropriate rate of return for the subject utilities (7.34% water; 8.13% wastewater). The parties dispute the appropriate capital structure and equity cost rate. The utilities seek to establish a cost of capital (equity cost rate) that is 4-5 percentage points higher than recommended by Dr. Woolridge.

The pre-filed testimony of RAPA staff analyst Janet Fairchild incorporated Dr. Woolridge's recommendations regarding rate of return into her overall revenue requirement analysis. Ms. Fairchild's analysis concluded that FSW is presently *over-recovering* in rates 2.46% from its water customers and 7.18% from its wastewater customers, respectively. Thus, her testimony flatly rejected the utilities' proposed 5% annual rate increases, and projected that refunds in an amount to be determined would likely be due if the commission agreed with RAPA advocacy.

A hearing is scheduled for March 2008.

### **Torts and Workers' Compensation**

***Greer v. State, Department of Natural Resources (DNR).*** In this case, Superior Court Judge Sharon Gleason granted summary judgment on all claims in favor of the Department of Natural Resources, represented by AAG Ruth Botstein. Greer, a ticket taker in a state park, was injured in a boat collision while she was riding on a river in a state-owned vessel. She received workers' compensation for her injuries. Three and a half-years later, Greer filed a civil action, alleging that she was a seaman entitled to maritime tort and other remedies under federal law. The trial court agreed with DNR that Greer's claims were barred by the three-year

statute of limitation and that Greer had not demonstrated any justification for her failure to timely file suit, and dismissed all of Greer's claims.

## Transportation

### **Court Rules on Challenge to Transportation**

**Planning Statutes.** The Municipality of Anchorage challenged SB 71, a statute purporting to direct transportation funding priorities, and SB 260, a statute dictating the composition of the AMATS policy board – a municipal/state board that helps make transportation funding decisions in Anchorage. The superior court ruled the statutes violated federal transportation law. AAG Jeff Stark represented the state.

**Commissioner Adopts Regulations.** The Commissioner of Transportation and Public Facilities adopted new regulations governing the state's rural airports. The regulations will now undergo review by the Department of Law's regulations section. AAG John Steiner devoted a considerable amount of time and effort helping the Department of Transportation and Public Facilities develop this regulations packet.

**Section Event.** The Transportation Section held a statewide section seminar and meeting in Anchorage. Section members from Anchorage, Fairbanks, and Juneau met with each other and with client representatives, striving to improve our provision of legal services and our knowledge of substantive law.

## CRIMINAL DIVISION

### Anchorage DAO

ADA Susan Mitchell of the Dillingham DAO has tried twelve cases in the first six months of her tenure. This month, she succeeded in arguing for consecutive sentences for five counts of sexual abuse of a minor in the second degree

on which Tugatuk's jury convicted the defendant. Judge Torissi sentenced him to twenty with five suspended.

ADA Brittany Dunlop convicted Randall Gehrke of burglary one and criminal mischief after he broke into a residence in downtown Anchorage. The victim was in the bathroom when his front doorbell rang several times. He then heard the door being rammed and broken. He confronted the defendant with a replica revolver he had retrieved from his bedroom. Mr. Gehrke turned and ran from the home. He was apprehended just a few blocks away and was positively identified by the victim and an alert neighbor. APD detectives had been investigating him on other cases, and obtained a search warrant for his belongings at a nearby hotel. In his wallet they found a list of homes to burglarize, along with a corresponding hand-drawn map to those residences. The list was dated just days before the incident. He is presumptive six-ten on the B felony. He also has three years of exposure in a petition to revoke based on this incident. It is his third petition off of a 1996 robbery conviction.

ADA Ben Hofmeister traveled to Dillingham to try 24-year-old Chris Strub for second degree assault in an alcohol-fueled car crash. Although local sentiment may have favored this son of a prominent Dillingham family, the jury convicted.

ADA John Novak negotiated fourteen guilty pleas to various crimes (from murder two to vehicle theft) for the outrageous conduct of a drunken Kris Felber who stole a truck then fled from police. Along the way he damaged many cars, scared many other drivers and eventually ran over another vehicle, killing that driver. The sentencing is set for February. The agreed range is 50-85 years.

ADA Gustaf Olson tried Jefferson Earl for first degree assault (shooting) after the victim of the crime sold him "soap not dope". The jury deliberated for four days and hung. Apparently the jury did not know who to trust in this drug

deal gone bad. The severed felon in possession count will be tried to a different jury.

November was the last month for ADA Dan Garcia, who stayed just under two years. He went out with a felony DUI victory for a man who claimed “necessity” for sitting, drunk, behind the wheel of his car. He claimed that he “needed” to keep warm and was only operating the vehicle out of necessity. Trouble was, it was May and he was parked in his own driveway.

ADA Dan Shorey and DA Adrienne Bachman attempted to try the four-year-old murder case against Derrick Wren. After four days of jury selection the Public Defender Agency determined that they had a conflict which required them to withdraw from the case. New counsel will be appointed by OPA.

ADA John Skidmore tried Oscar Anasogak for attempted murder. Good case, great facts. Quick verdict.

### Bethel DAO

The Bethel office continued to be busy this month. Jody Lown, (retired long-time criminal division paralegal and paralegal administrator) helped the office with paralegal duties for two weeks in mid-November; the office was extremely grateful to have her assistance.

### **Sentencing Hearings**

Patrick Olson was sentenced for attempted sexual assault against a minor II committed upon a five-year-old victim. Olson pled no contest and admitted aggravator ten: that the conduct constituting the offense was among the most serious conduct included in the definition of the offense. The Rule 11 agreement capped his possible time to serve at nine years but left suspended time and length of probation open. The Bethel Superior Court sentenced Olson to twelve years with six years suspended and five

years probation. ADA Thomas Jamgochian prosecuted. Olson committed his crime in Bethel, Alaska.

Aloysius Patrick pled to assault in the second degree on his wife for beating her with a hammer, causing extensive bruising over most of her body. Patrick had three prior convictions for misdemeanor assault on his wife and conceded the deliberate cruelty aggravator. In an open sentence, Bethel Superior Court sentenced him to five years with two suspended and five years probation. ADA Thomas Jamgochian also prosecuted this case. Patrick committed his crime in Alakanuk, Alaska.

Derrick Alexie pled to assault in the first degree with an open sentence for shooting his father in the head with a 12-gauge shotgun. Alexie admitted aggravators of deliberate cruelty and repeat assaultive conduct. Bethel Superior Court sentenced Alexie to fourteen years with five years suspended and five years probation. ADA David Buettner prosecuted. Alexie committed his crime in Mountain Village, Alaska.

Allen Andrews pled to assault in the second degree for stabbing his brother in law in the back with a knife, puncturing his lung. The sentencing was open and Andrews admitted four aggravating factors including that the conduct constituting the offense was among the most serious conduct included in the definition of the offense. Bethel Superior Court Sentenced Andrews to seven years with four years suspended with five years probation and revoked six months from a misdemeanor assault probation case. ADA David Buettner prosecuted. Andrews committed his crime in St. Mary's, Alaska.

Rural Prosecution Unit attorneys were in Bethel off and on during the month. AAG Dwayne McConnell handled a jailhouse sexual assault where two of the participants changed their pleas in November pursuant to Rule 11 agreements that require each co-defendant to serve twenty years. AAG Regan Williams was here for a few days while attorneys were on leave and AAG



Gregg Olson also stopped in Bethel for a day to indict Jonathon Kashatok of murder in the second degree and sexual assault in the first degree.

ADA Christian Carpeneti went to Aniak for a community based felony sentencing on an alcohol importation conviction.

ADA Patty Burley has been busy pushing her cases forward and spent a lot of time in trial during the month.

ADA Barkis assisted Hooper Bay Police Department with a search warrant fraught with interesting remote-policing issues. The temperature rose uncharacteristically for late November, causing flooding and travel hazards in the area. The police could not get to the neighboring village of Chevak to obtain a search warrant from the magistrate because the river was only partially frozen and completely unsafe for either snow machine or four wheeler travel. There are no roads. Planes were grounded due high winds in excess of 50 miles per hour. Hooper Bay telephones went out due to wind and flooding, thus making obtaining a telephonic search warrant nearly impossible; fax machines were out. A cellular phone was found in Hooper Bay and used to call ADA Barkis and the village magistrate. A warrant ultimately was issued and several pounds of marijuana, guns and thousands of dollars in cash were recovered.

### Fairbanks DAO

With the addition of ADA Andrew "Andy" Baldock to the offices, for the first time in a long time, the Fairbanks DAO is at full capacity (although one attorney is off on maternity leave and won't be back until after Christmas). It is noted that ADA Baldock drove his Jetta from Illinois, up the Alcan in winter with regular tread tires and he made it! While that act alone gave many on staff reason to question his mental faculties, those hesitations were

subsequently confirmed when he volunteered to cover the Barrow DAO during Christmas week.

The Fairbanks DAO presented thirty-nine cases to grand jury during the month, and had eleven cases go trial. One of the more notable trial cases included a trial victory by ADA Elizabeth Crail in which the jury convicted Antwan McRae of one count of misconduct involving a controlled substance in the first degree (MICS 1) and two counts of misconduct involving a controlled substance in the second degree (MICS2). This victory was particularly pleasing in that the MICS 1 evidence was principally founded on the uncorroborated testimony of an informant working with the police department. Both of the MICS2 counts were the result of "wired" (recorded) buys in which the informant's actions were closely observed by members of the local drug task force who were able to testify and corroborate much of the informant's testimony.

The MICS1 was entirely predicated upon the uncorroborated testimony of the informant. The jury took only 90 minutes to come back guilty on all felony counts. Very often MICS charges based only on informant information are not cases which get filed, much less taken to trial. Here the tenaciousness of ADA Crail deserves specific honorable mention.

### Juneau DAO

The Juneau office had another busy month of indictments for misconduct involving a controlled substance in the third and fourth degrees, and a string of felony thefts from Fred Meyer involving defendants pushing loaded shopping carts out of the store without paying for the merchandise.

Timothy Foster was indicted for escape in the second degree and his girlfriend, Kimberly Brakes, for aiding and abetting escape in the second degree and hindering prosecution in the first degree. Ms. Brakes harbored Mr. Foster after she drove him from the half-way house

where he had been placed by the Department of Corrections while on felony probation.

### Kenai DAO

November was busy with trials in several venues at the same time.

ADA Scot Leaders did a trial for a burglary occurring in a building that was a store with a separate living apartment. The defendant burglarized both areas and had actually moved into the building he was burglarizing. At trial, the public defender tried to argue that it wasn't a residence, so if it was anything it was burglary second rather than burglary first. The defendant, who was male, was found by police inside the victim's apartment, wearing her clothing, with more of her items packed in a bag ready to go. He had already entered the building previously and stolen some items from the store that he had given to people with the price tags still on them. Those people reported him to the police. The jury convicted on all counts.

Both ADA Kelly Lawson and ADA Angela Jamieson had fear assault trials. ADA Lawson's was in Homer and the defendant was convicted of both the assault and disorderly conduct. He is a frequent flyer with a pending felony assault, so this was a significant conviction. One of the jurors called the police department after the jury was discharged and stated that the jurors wanted to go on record with their concerns regarding possible retaliation. Despite that, they had the courage of their convictions and brought in both guilty verdicts.

ADA Jamieson's jury hung five to one for conviction, although the five jurors made the one juror listen to all the playbacks and review all of the law. They were convinced of the defendant's guilt, despite a recanting domestic violence victim.

A bookkeeper who embezzled over \$250,000 from her employers was sentenced on charges of scheme to defraud, theft in the first, tampering with business records, and tampering with evidence. Over a period of five years the defendant wrote a series of checks to herself, her mother, and her boyfriend as well as obtained credit cards and used them for personal purchases. She received a sentence of ten years with five years suspended and probation for ten years. The restitution hearing is yet to come.

The grand jury has been kept busy this month as well. So far they have indicted nine DUIs, six drug cases, numerous assaults, two eludings, two white collar cases, a contraband in the jail, and an attempted murder.

In one of the drug cases, the defendant was indicted on various counts of misconduct involving a controlled substance in the third degree for possessing cocaine with intent to distribute. The court issued a warrant for the defendant's arrest, and when the officers contacted the defendant to serve the warrant, they found new evidence of misconduct involving a controlled substance in the third degree, including more drugs and records of drug sales—listing names, amounts received, and drugs provided. The grand jury had no problem indicting that second case.

In one of the white collar cases there seems to be a never-ending list of victims. ADA Scot Leaders kept adding on more charges and more victims up to the day of grand jury, and then the next day a new victim appeared at the counter of the police department. The defendant's activity consisted primarily of stealing mail from people's roadside mail boxes. In some cases he obtained credit cards, and in some he got the credit card checks. The victims don't know that they are victims until they get their monthly statements.

In another one of the white collar cases, the defendant wrote over 80 bad checks in a short period of time when he had no money in his

account. He said that he thought someone was supposed to put money in the account but he never bothered to check.

The attempted murder occurred when a homeowner got angry at people he characterized as sponging off of him. He decided that he was going to put an end to it, so, according to his own statement, he went inside the house, loaded a gun, thought about it, and put the gun away. Ten minutes later he got angrier, went back inside, retrieved the gun, and came out with it hidden behind his leg. Words were exchanged between the homeowner and a soon-to-be victim. The homeowner pulled the gun out and shot the victim in the stomach. The victim's lung collapsed and in subsequent surgeries, he has lost his gallbladder and part of his liver. While waiting for the police to arrive, people at the residence burned up the marijuana grow that was in an outbuilding on the property. The shooter's son also fled the residence prior to the officers' arrival and took the gun with him.

### Kodiak DAO

Kodiak began the month with a visit from Attorney General Colberg and Deputy Attorney General Svobodny.

Criminal activity on the island has been steady. The grand jury indicted a Kodiak man for felony assault based upon his attempting to force the driver of another car off the road. He is pending trial for assault three and driving under the influence. The grand jury also indicted a Kodiak woman who went to her ex-husband's home after being trespassed from the residence and attacking the ex's girlfriend.

Judge Bolger sentenced 45-year-old Ricky Stersic to thirty years with ten years suspended following his plea to attempted sexual abuse of a minor in the first degree. The defendant pled after being discovered in a bedroom by the four-year-old victim's caretaker with whom he

had been involved in a relationship. The caretaker identified the defendant as her "ex" to the police when they arrived, following her report of the assault. The defendant admitted the offense to the responding officers.

### Nome DAO

Dennis Davison was convicted by a Nome jury of first degree sexual assault, first degree sexual abuse of a minor, and incest. Last March in Elim, Davison raped his 14-year-old daughter while his wife was away for work. Trial lasted three days. The jury, which included a retired defense attorney and two prior defendants (one of whom had been convicted in the prosecuting attorney's last case to go to trial) reached its decision quickly. Sentencing is set for next April.

### Palmer DAO

On November 1 in Valdez, Frostine Monegan-Hamilton was sentenced to ten years, with four years suspended, and five years of probation after a plea to assault in the second degree. In 2006, Monegan-Hamilton put her four-year-old stepson in a bath tub of extremely hot water, causing third-degree burns over a third of his body. The victim was taken to Seattle where he spent nearly two months in intensive care. The boy nearly died from his injuries and is severely scarred. Monegan-Hamilton's husband was convicted of felony child endangerment, even though he was in Anchorage at the time of the incident.

Burton Naczi was indicted on one count of murder in the second degree and one count of manslaughter for killing his six-month-old daughter. The child's mother brought her to Mat-Su Regional hospital after Naczi's weekend visitation. Surgery was performed to relieve pressure and swelling on her brain, but the infant succumbed to the injuries. Naczi originally told police that he had fallen down the stairs

with the baby, but later admitted he had shaken the baby and thrown her on a couch. Naczi remains in custody pending trial.

Christopher Woodard was sentenced to thirty years, with five years suspended, for sexual abuse of a minor in the first Degree. John Elder was sentenced to almost eight years for assault in the third degree, assault in the fourth degree and probation violations for strangling his girlfriend.

Jerry Tanner pled no contest to two counts of attempted sexual assault in the second degree for sexual assaults on two brothers at Tanner's residence. Tanner's DNA was found on one brother who was passed out in Tanner's bedroom. The other brother told police that Tanner had him in a corner and tried to unbuckle his pants. Tanner will be sentenced in 2008.

Viktor Natekin was convicted by a Palmer jury of attempted sexual assault in the first degree and sexual assault in the second degree for pulling a 17-year-old female into a room, groping her and trying to get her pants down. The assault was thwarted when the victim's friend called her cell phone, heard the assault and knocked down the door to come to the victim's aid. At trial, defendant claimed that the victim stole money from him and he was looking for it.

Timothy Mills was convicted by a Valdez jury of sexual assault in the second degree, two counts of assault in the fourth degree, two counts of harassment in the second degree and three counts of violating conditions of release. Last summer, Mills approached a group of young girls in Valdez, followed them and made lewd comments. The girls, ages 12 to 15 were all very scared. Mills grabbed one girl's buttock and pulled down another girl's shirt, touching her breast in the process.

## Sitka DAO

The office indicted Gilbert R. Sam, Jr. for assault in the second degree for strangling his girlfriend. During grand jury, the victim testified that Mr. Sam was not the one who strangled her. The victim then told the grand jury that "Li'l Shank", who she later testified lived in Mr. Sam's body, was the person who strangled her. The office is also prosecuting a woman who was arrested for driving while under the influence stemming from a vehicle accident that occurred as she was driving her children to school. As part of her conditions of release, the defendant was ordered to go to the Sitka Police Department every day and submit to a breath test. On the day after her arraignment and release, the defendant drove to the police department and submitted to a breath test which registered a BAC of 0.09%. The defendant was then charged with a second driving while under the influence.

## Office of Special Prosecutions and Appeals (OSPA)

### **Appellate Unit**

The month of November saw notable victories in two state appeals brought by the Appeals Unit of the Office of Special Prosecutions in addition to the unit's normal workload of defending the state in appeals brought by defendants.

The Alaska Court of Appeals sided with the arguments made by AAG Mick Hawley in *State v. Joseph Kameroff* that a defendant should not be able to plead to lesser-included offenses and thereby prevent the state from prosecuting on greater (more serious) offenses. AAG Hawley's victory resulted in the Alaska Court of Appeals reversing Superior Court Judge Leonard Devaney and reinstating the felony charges in a sexual assault prosecution.

AAG Diane Wendlandt convinced the Alaska Supreme Court in *State v. Lina Garrison* that

Garrison's speculative claims did not entitle her to raise a necessity defense in a trial for driving while under the influence (DUI). AAG Wendlandt's success resulted in the Alaska Supreme Court reversing Superior Court Judge Patricia Collins and the state being able to retry Garrison for DUI after a hung jury in the first trial. (It is believed the jury hung because Garrison was allowed to advance a necessity defense in the first trial.)

In *Adrian Ortiz v. State*, the Alaska Court of Appeals held that application of a new restitution statute was *ex post facto* as to a defendant who had committed his offense before the new statute went into effect. The Appeals Unit will be petitioning the Alaska Supreme Court to review the court of appeals' ruling, as the new statute only memorializes what was available to victims as a civil remedy before the passage of the new statute.

#### **Environmental Crime Unit**

In October, AAG Dan Cheyette concluded a months-long joint investigation alongside federal Department of Justice prosecutors and Alaska DEC and federal EPA investigators into the March 2006 North Slope oil pipeline leak at a British Petroleum (BPXA) facility. In a negotiated settlement, BPXA settled state and federal criminal charges with a plea to one federal misdemeanor count of violating the Clean Water Act. The sentence included \$20 million in penalties. This includes \$4 million to be paid directly to the State of Alaska and another \$4 million to pay for Arctic research. This is believed to be the largest criminal penalty ever imposed as a result of a state environmental violation.

#### **Rural Prosecution Unit**

The Rural Prosecution Unit has been busy handling its caseload, traveling to rural offices and assisting rural attorneys this month.

All of the Rural Prosecution attorneys appeared at telephonic hearings in Bethel throughout the

month, and each also traveled there. AAG Dwayne McConnell visited in mid-month, to assist in the Bethel DA's Office and to resolve two cases in which inmates at the Yukon Kuskokwim Delta Correctional Facility admitted to assaulting another inmate at the facility. AAG Gregg Olson was in Bethel earlier in the month, to seek and obtain an indictment against Jonathan Kashatok for the sexual assault and murder of his wife. The grand jury returned charges of first and second degree murder and sexual assault in the first degree. Kashatok remains in custody on \$250,000 bail with trial scheduled in May 2008. AAG Olson also represented the state at a superior court hearing in *State v. Evan Ramsey*, the Bethel School shooting case. With the assistance of AAG Tim Terrell, the state successfully argued that any issues regarding Ramsey's concurrent sentences for assault are moot.

AAG Regan Williams went to Bethel on November 2-3 to assist in the office and assist with the Kashatok murder case. He returned toward the end of the month to assist the office and to resolve cases involving sexual assault and domestic violence.

In addition to the constant victim/witness paralegal work, Victim/Witness Paralegal Nanette Lindsey traveled to Bethel on November 26-30 to assist the Bethel DA's office with paralegal work, since that office is still attempting to fill a paralegal vacancy.

### **SAVE THE DATE**

December 18 -	Anchorage Holiday Party
December 20 -	Juneau Holiday Party (The Buoy Deck)